85-1257

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1985

—o—

TERRY ROGERS and BRENDA ROGERS,
Appellants,

vs.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,
Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF WYOMING

—o—

JURISDICTIONAL STATEMENT

—o—

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FRONTIER PRINTING, INC., Cheyenne

QUESTION PRESENTED

Whether the Cheyenne Municipal Airport Zoning Ordinance, which imposes height limitations for structures and trees within certain zones for the purpose of providing obstruction free non-instrument approach zones utilized for the landing and taking off of airplanes at a public airport, is an unconstitutional "taking" in violation of the "Taking Clause" of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment, when there is shown actual damage resulting from use of the landowners' airspace for such public purpose.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Wyoming, which appears in Appendix A at p. 17, *infra*, is reported at 707 P.2d 717 (Wyo. 1985).

The findings of fact and conclusions of law of the District Court of the First Judicial District of the State of Wyoming are not officially reported. A copy of the Judgment and the court's oral comments at the conclusion of the trial appear in the appendix hereto at Appendix C, p. 43, and Appendix D, p. 45, *infra*.

JURISDICTION

Terry and Brenda Rogers, appellants, appeal from the final judgment of the Supreme Court of Wyoming, which held that enforcement of Section 4(2) of the Cheyenne Municipal Airport Zoning Ordinance of the City of Cheyenne relating to height limitations of structures and trees is constitutional pursuant to the "taking" clause of the Fifth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment to the United States Constitution.

The judgment of the Supreme Court of Wyoming, reversing the judgment of the lower court, was entered on October 8, 1985. See Appendix A, p. 17, *infra*. A petition for rehearing was denied on November 1, 1985. See Appendix B, p. 42, *infra*. A Notice of Appeal to this Court was duly filed in the Supreme Court of Wyoming on the 4th day of November, 1985. See Appendix E, p. 48, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1257(2).

Since this proceeding draws into question the constitutionality of a statute of the State of Wyoming, namely the Cheyenne Municipal Airport Zoning Ordinance, and neither the State of Wyoming nor any agency, officer or employee of the State of Wyoming is a party, it is noted that 28 U.S.C. 2403(b) may be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

49 U.S.C. 1301(29) provides in pertinent part:

"Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in taking-off and landing of aircraft.

49 U.S.C. 1304 provides in pertinent part:

There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

49 U.S.C. 1506 provides:

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

49 U.S.C. 1508 provides in pertinent part:

The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes over which by international law or treaty or convention the United States exercises national jurisdiction.

Wyo. Stat. 1-3-103 provides:

> An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action accrues.

Wyo. Stat. 10-4-301 provides:

> Sovereignty in the space above the lands and waters of this state is declared to rest in the state except where assumed by the United States Law.

Wyo. Stat. 10-4-302 provides:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of flight described in Wyo. Stat. 10-4-303.

Wyo. Stat. 10-4-303(a) provides:

> (a) Flight in aircraft over the lands and waters of this state is lawful unless it is:
>
> (i) At such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owner;
>
> (ii) Conducted as to be imminently dangerous to persons or property lawfully on the land or water; or
>
> (iii) In violation of the air commerce regulations promulgated by the Department of Transportation of the United States.

Wyo. Stat. 10-5-301 provides:

> "(a) The governing body of each incorporated Wyoming municipality and county may regulate and restrict by ordinance the

number of stories and size of buildings and the height of other structures constructed upon land within one-half (½) mile of the boundaries of airports owned or controlled by the town, city or county. They may provide zoning for airspace beyond one-half (½) mile of the boundaries and within the county, to assure aircraft reasonable safety for visual and instrument approach and departure. The right to zone shall be confined to the geographical limits of the current applicable approach zone established by the Federal Aviation Administration for the particular airport and in no case shall the right to zone extend beyond six (6) nautical miles along the approach path from the end of the instrument runway."

Section 3(2) of the Cheyenne Municipal Airport Zoning Ordinance provides:

"A noninstrument approach zone is established at each end of all noninstrument runways on the Cheyenne Municipal Airport for noninstrument landings and takeoffs. The noninstrument approach zone shall have a width of five hundred (500) feet at a distance of two hundred (200) feet beyond each end of the runway, widening thereafter uniformly to a width of two thousand five hundred (2,500) feet at a distance of ten thousand two hundred (10,200) feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway."

Section 4(2) of the Cheyenne Municipal Airport Zoning Ordinance provides in pertinent part:

Except as otherwise provided in this ordinance, no structure or tree shall be

erected, altered, allowed to grow, or maintained in any zone created by this ordinance to a height in excess of the height limit herein established for such zone. Such height limitations are hereby established for each of the zones in question as follows:

* * * *

(2) **Noninstrumental approach zones:** One foot in height for each forty (40) feet in horizontal distance beginning at a point two hundred (200) feet from and at the elevation of the end of the noninstrument runway and extending to a point ten thousand two hundred (10,200) feet from the end of the runway; . . . .

* * * *

STATEMENT OF THE CASE

This case involves the question as to whether or not a height limitation ordinance enacted by the City of Cheyenne, Wyoming, for purposes of providing a "noninstrument approach zone" utilized for the landing and taking off of airplanes at a publicly owned and operated airport constitutes a "taking" for a public purpose when enforcement of that ordinance would cause actual loss and harm to the landowners within that zone.

The ordinance, (specifically, Sections 3(2) and 4(2)), which restricts the height of structures and trees within a specifically described noninstrument approach zone extending from the end of runways, is authorized by state statute. (Wyo. Stat. 10-5-301). Appellants' property falls within such zone and a large, fully developed cottonwood tree on their property extends into the prohibited zone set forth in the ordinance.

The undisputed evidence at trial showed that the appellants had owned the property in question since 1976, and had lived in the residence since 1974. In 1982, the Cheyenne Airport Board informed appellants that a mature cottonwood tree, located on their property, was in violation of the Cheyenne Municipal Airport Zoning Ordinance enacted in October, 1974. As a consequence, appellants were informed that a full thirteen feet would have to be cut from the top of their tree, at appellants' expense, to provide an obstruction free noninstrument approach zone utilized for landing and taking-off of airplanes from the publicly owned and operated airport.

After a considerable time, during which City and Airport Board Officials demanded that appellants cut their tree, appellants submitted a claim for damages to the City, which was denied. Thereafter, an action for declaratory and injunctive relief was filed in Laramie County District Court.

Appellants alleged in their complaint, *inter alia*, that the ordinance, on its face and as applied to appellants specifically, was unconstitutional, as it constituted a taking of private property for a public use without compensation in violation of the Fifth Amendment to the United States Constitution. After the evidence was closed, appellants were granted leave to amend their complaint to additionally allege violation of the Fourteenth Amendment to the United States Constitution.

At the time of trial the evidence showed that twenty-two feet of the tree would have to be cut to bring it into conformity with the ordinance and, to do so, would cause a total loss of the tree which would be equal to an actual loss of $2,064.00.

The trial court held that the ordinance, as applied to the appellants, was unconstitutional as it constituted a taking of private property for public use without just compensation and enjoined the City and Airport Board from enforcing the ordinance against appellants. (Appendix C, *infra*, p. 43; and Appendix D, *infra*, p. 45).

Appellees appealed the issue of "taking" to the Wyoming Supreme Court, which reversed. **Cheyenne Airport Board v. Rogers,** 707 P.2d 717 (Wyo. 1983).
The court held:

a. That, by virtue of either the Air Commerce Act of 1926 (49 U.S.C. 1304) or the Wyoming Uniform State Law for Aeronautics of 1931 (Wyo. Stat. 10-4-301), which declare a public right of free transit through "navigable airspace," the appellants' cause of action was barred by the ten year statute of limitations for recovery of real property, (**Cheyenne Airport Board,** *supra*, p. 725); and

b. that the ordinance complied with the requirements of substantive due process as being rationally related to a legitimate state interest, citing **Gorieb v. Fox,** 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1928), **Village of Euclid, Ohio v. Ambler Realty Co.,** 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) and **Penn Central Transportation Co. v. City of New York,** 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), (**Cheyenne Airport Board,** *supra*, p. 728-729); and

c. that, as applied to appellants the ordinance did not constitute a "taking" because the appellants had not shown a significant enough impact to counterbalance a significant public interest in protecting the airport flight path, citing **Penn Central Transportation Co. v. City of New York,** *supra*. **(Cheyenne Airport Board,** *supra*, p. 732).

The court also stated that appellants had not sought a variance prior to suit. **Cheyenne Airport Board,** *supra*, p. 723.

This assertion is totally unsupported by the evidence. Appellees did not raise the issue of "ripeness" either at the trial court or before the appellate court since there was an agreement between the appellee-city and appellants that the appellants did not need to seek a variance prior to suit.

THE QUESTION IS SUBSTANTIAL

a.

There is a conflict among the states regarding the constitutionality of airport height limitation ordinances, the Wyoming Court being alone in holding them to be constitutional when actual damage is shown.

The question presented on this appeal has never been directly passed upon by this court. However, based upon previous decisions by this court, a number of state courts of last resort have held airport height limitation ordinances to constitute a "taking" of property without compensation and have either enjoined enforcement or ordered compensation to be made.

The Supreme Court of Wyoming is the only state court of last resort to hold that height limitation ordinances which regulate the height of structures or trees surrounding airports to provide obstruction free aircraft approach zones, within the reasonably useable airspace of landowners, are constitutionally acceptable under the "Taking Clause" of the Fifth Amendment when there has been an undisputed showing of actual damage or loss. See **Yara Engineering Corporation v. Newark,** 40 A.2d 559 (N.J. 1945); **Rice v. Newark,** 40 A.2d 561 (N.J. 1945); **Indiana Toll Road Commission v. Jankovich,** 193 N.E.2d 237 (Ind. 1963); **Sneed v. County of Riverside,** 32 Cal.Rep. 318 (1963); **Roark v. City of Caldwell,** 394 P.2d 641 (Id. 1964); **Jackson Municipal Airport Authority v. Evans,** 191 S.2d 126 (Miss. 1966); **Hageman v. Board of Trustees of Wayne Township,** 20 Ohio App.2d 12, 251 N.E.2d 507 (1969); **Jackson Airport Authority v. Wright,** 232 S.2d 709 (Miss.

1970); **McShane v. City of Fairbault,** 292 N.W.2d 283 (Minn. 1980).

Other courts have eitner not reached the "taking" issue or have found no damage to the property in question. See **Harrel's Candy Kitchen v. Sarasota-Manatee Airport Authority,** 111 S.2d 439 (Fla. 1959); **Waring v. Peterson,** 137 S.2d 268 (Fla.App. 1962); **Village of Willoughby Hills v. Corrigan,** 29 Ohio St.2d 39, 278 N.E.2d 658 (1962); **Baggett v. City of Montgomery,** 276 Ala. 166, 160 S.2d 6 (1964); **LaSalle National Bank v. County of Cook,** 34 Ill.App.3d 264, 340 N.E.2d 79 (1975).

In so holding, the lower court erroneously ruled that the multifactor standards set forth in **Penn Central Transportation Co. v. New York City,** 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) should be applied in a case where the "zoning" regulation is not solely to promote a substantial public purpose, but also results in acquisition and actual use and occupation of air rights to permit a uniquely public function; i.e., public air transportation. **Cheyenne Airport Board,** *supra*, p. 731. **United States v. Causby,** 328 U.S. 256, 123-128, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); **Griggs v. County of Allegheny, Pennsylvania,** 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); **Loretto v. Teleprompter Manhattan CATV Corp.,** 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982).

The lower court also erred in holding that the federal government had acquired an air easement in appellants' property by virtue of enactment of the Air Commerce Act of 1926 (49 U.S.C. 1304 (1958)), (**Cheyenne Airport Board,** *supra*, p. 725-726), and that the ordinance was enacted to protect the previously acquired easement from surface activities. **Cheyenne Airport Board,** *supra*, p. 725. **Braniff Airways v. Nebraska State Board of Equalization and Assessment,** 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954).

In light of the direct conflict and division of authority among the states as to the constitutionality of airport height limitations

zoning ordinances under the "Taking Clause" of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, **Chicago Burlington and Quincy Railroad Co. v. City of Chicago**, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), and in view of the previous opinions of this court relating to the application of the "Taking Clause" to invasions of airspace by aircraft, (**Griggs,** *supra*), and the application of the "Taking Clause" to actual use or occupation of property by the government to permit uniquely public functions, (**Loretto,** *supra*), this court should note probable jurisdiction to define constitutional limitations, if any, of so-called airport height limitation ordinances.

b.

This court has held that use of reasonably useable enveloping airspace for public air flight constitutes a "taking."

In **United States v. Causby,** 328 U. S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946), a landowner brought an action against the United States for damages in the U. S. Court of Claims because low flying aircraft were disturbing his chicken raising enterprise causing him to go out of business. **Causby,** *supra*, p. 258. The federal government argued that since the Congress had assumed "sovereignty" in navigable airspace, and since the flights were within minimum safe altitudes, no "taking" had occured and such flights were an exercise of the declared right of travel through airspace. **Causby,** *supra*, p. 260. The government also argued that in order for a "taking" to occur, the land would have to be rendered useless. **Causby,** *supra*, p. 261.

This court disagreed and held that even though airspace is a public highway, if a landowner ". . . is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere." **Causby,** *supra*, p. 264. Relying on state law nearly identical to Wyoming Law which "vests" ownership of airspace in the owners of the surface subject to "lawful flight," which cannot be at such low

altitude as to interfere with existing uses of the land beneath, the **Causby** court held that low-level flights imposed a "servitude" upon the land and such was a "taking." **Causby,** *supra*, p. 266-267.

The same result was reached in **Griggs,** *supra*, after the enactment of the Federal Aviation Act of 1958 (49 U.S.C. 1301 et.seq.) which redefined navigable airspace as including airspace needed for landing and taking-off of aircraft. (49 U.S.C. 1301(29)). This court again held that despite such redefinition a "taking" occurred when low-flying aircraft made the landowner's life "unbearable." **Griggs,** *supra*, p. 87, 88-89, citing **Ackerman v. Port of Seattle,** 348 P.2d 664 (Wash. 1960).

Thus, **Causby** and **Griggs** provided the basis upon which many state courts have held that low-flying aircraft, even if they were within "navigable airspace," and ordinances providing for obstruction free approach zones, cause a taking to occur when damage is shown.

c.

Utilization of the "Multifactor Standards" of **Penn Central Transportation Co.** is inappropriate; "Physical Occupation" being "Determinative."

It is clear that this court has long held that low-level flight of aircraft which causes damage to or prevents reasonable use of the surface land and its enveloping airspace constitutes a "taking" requiring compensation. (See **Causby**, and **Griggs,** *supra*,).

The question in this case, however, is whether a zoning ordinance enacted to create unobstructed approach zones for low-level landing and taking-off of airplanes at a public airport, enforcement of which will cause actual damage, is a "taking" given the holdings in **Causby** and **Griggs,** *supra*, and other holdings of this court regarding zoning and "taking."

Zoning ordinances, in general, have been approved as not being violative of the "Taking Clause" so long as the regulation of land use is reasonably calculated to promote "health, safety, morals, or general welfare." **Euclid v. Ambler Realty Co.**, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); **Gorieb v. Fox**, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); **Goldblatt v. Town of Hempstead, New York**, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

However, in a number of instances, beginning with **Pennsylvania Coal Co. v. Mahon,** 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), this court has also held that a law or regulation that substantially furthers important public policies may ". . . so frustrate distinct investment back expectations as to amount to a 'taking.' " **Penn Central Transportation Co.**, *supra*, p. 127. See **Kaiser-Aetna v. United States,** 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979).

Even though this court has said there is "no set formula" for determining where a regulation, law or ordinance ceases to be a valid exercise of the "police power" and becomes, instead, a "taking," (**Goldblatt,** *supra*, p. 594), in **Penn Central Transportation Co.,** *supra*, the court attempted to set forth multifactor standards to aid in making such determinations. In **Penn Central** the court said that the significance of the governmental interest involved, the economic impact of the regulation and *the character of the governmental action* are factual inquiries which may guide courts in determining the "taking" question. 438 U.S. at 130-131.

However, in **Loretto,** *supra*, this court set forth an important *per se* rule which makes unnecessary any analysis of the "taking" issue under the **Penn Central** "multifactor standards." The court held that when the "character of the governmental action" constitutes an intrusion which reaches the extreme form of a permanent physical occupation, a "taking" has occured. The **Loretto** court said that such a physical occupation is not only an important factor in resolving a taking question---it is "*determinative*." **Loretto,** *supra*, p. 425.

In **Kaiser-Aetna,** *supra,* the court used the determinative "physical occupation" test and held that to compel an owner of a private marina to allow public access under the "navigable waters" servitude was allowing a physical invasion of the privately owned marina and held that a taking had occured. **Kaiser-Aetna,** *supra,* p. 180. See also **Pumpelly v. Green Bay and Mississippi Canal Co.,** 80 U.S. 166, 13 Wall. 166, 20 L.Ed. 557 (1871).

In the case on appeal, it is clear that the appellees wish to allow aircraft to fly through appellants' airspace, ownership of which is "vested" in them as the owners of the surface pursuant to state law, (Wyo. Stat. 10-4-303 (Rep. Ed. 1977), for the purpose of providing airspace for the take-off and landing of aircraft by the public. Such a physical invasion should be the determinative factor in resolving the taking issue in this case pursuant to **Causby, Griggs, Loretto** and **Kaiser-Aetna,** *supra.*

Use of the multifactor standards of **Penn Central Transportation Co.,** *supra,* as did the lower court in **Cheyenne Airport Board,** *supra,* is inappropriate when a physical invasion is accomplished or sought and is a misconception of the standards of **Penn Central.** This is evident by the fact that **Penn Central** specifically distinguished its facts from those in **Causby. Penn Central,** *supra,* p. 135.

d.

The federal government does not own an easement in reasonably useable enveloping airspace by virtue of congressional declarations of sovereignty and rights of public transit.

The lower court grievously erred when it held that when the United States declared a right of free transit through navigable airspace (49 U.S.C. 1304 (1958)) it acquired an easement, giving rise to a claim for recovery of real property for which the Statute of Limitations (Wyo. Stat. 1-3-103) had long since expired. **Cheyenne Airport Board,** *supra,* p. 725.

Braniff Airways, *supra*, at p. 596, clearly held that the declaration of national sovereignty in airspace (49 U.S.C. 1508) was bottomed in the commerce power of Congress, not on national ownership in airspace. Furthermore, the Federal Aviation Act of 1958 (49 U.S.C. 1506) declares that nothing in the act shall " . . . in any way abridge or alter the remedies now existing at common law or by statute. . . ."

Clearly, then, by virtue of the common law of ownership of airspace and the Wyoming statute "*vesting*" in surface owners the airspace above the surface, subject to a lawful and noninterfering right of flight, (See Wyo. Stat. 10-4-302 and 303, *supra*), the appellants owned the airspace above their surface land which they use by having a tree.

In **Griggs**, *supra*, the court held that the taker of the easement was the one whose actions prompted the overflights, not the authorizing governmental agency nor the private users acting under the taker's auspices. See Humbach, **A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use,** 34 Rutgers L.Rev. Winter 1982, No. 2, 243, 263-264, n. 93. To say that mere congressional declarations of public transit through and sovereignty in airspace, without more, gives rise to a cause of action, is err, since a party must have "standing" to sue. **Duke Power Co. v. Carolina Environmental Study Group, Inc.**, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

e.

Summary

In sum, **Cheyenne Airport Board v. Rogers**, *supra*, is in direct conflict with a number of state court opinions and misapplies or misconstrues several applicable opinions of this court regarding the issue of "taking," and this court should note probable jurisdiction to resolve a clear conflict among state courts of last resort and the Wyoming Supreme Court's conflict with decisions of this court.

CONCLUSION

Probable jurisdiction should be noted.*

Respectfully submitted.

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*The Court may wish to consider summary reversal in light of **Causby**, **Griggs**, **Loretto** and **Kaiser-Aetna**.

APPENDIX A

IN THE SUPREME COURT

STATE OF WYOMING

CHEYENNE AIRPORT BOARD and CITY OF CHEYENNE,	)	OCTOBER TERM, A.D. 1985
	)	October 8, 1985
Appellants (Defendants),	)	
vs.	)	No. 84-301
TERRY ROGERS and BRENDA ROGERS,	)	
Appellees (Plaintiffs).	)	

Appeal from the District Court of Laramie County, the Honorable Paul T. Liamos, Jr., Judge.

John C. Patton and Royann Fransen of Carmichael, McNiff & Patton, Cheyenne, and R. Walter Connell, Assistant City Attorney, Cheyenne, for appellants; oral argument by Mr. Patton.

Bernard Q. Phelan, Cheyenne, for appellee.

Before THOMAS, C.J., and ROSE, ROONEY, BROWN, and CARDINE, JJ. CARDINE, Justice.

The question here presented for our determination is whether the City of Cheyenne zoning ordinance providing a height limitation in a noninstrument approach zone to the Cheyenne municipal airport is unconstitutional. The appellees, Terry and Brenda Rogers, own residential property in the noninstrument approach zone. The Rogerses purchased residential property in 1976, which was two years after the passage of the ordinance. The particular height limitation on their property, about 26 feet, has not affected the residential usage of the property. It does affect, however, a large cottonwood tree which apparently exceeded the height limit by a few feet on the date the ordinance was passed. By the time of trial

the tree had grown to a height of 48 feet and was, therefore, 22 feet above the height limitation.

For reasons that follow, we conclude that the ordinance is constitutional and valid as an excercise of the police power, both in general and as applicable to this case; that no compensable easement was taken; and, hence, that the judgment of the district court should be reversed.

On October 15, 1974, the City of Cheyenne adopted Ordinance No. 1969, §§ 1-15, Code Appendix B, which is entitled The Cheyenne Municipal Airport Zoning Ordinance. The general purpose of the ordinance is to keep the approach zones to the Cheyenne airport runways free from such obstructions as would interfere with the landing and taking off of airplanes.

Of particular importance to this case are the provisions for a noninstrument approach zone in § 3(2) and a height limitation on such zone in § 4(2) of the ordinance. Section 3(2) states:

> "A noninstrument approach zone is established at each end of all noninstrument runways on the Cheyenne Municipal Airport for noninstrument landings and takeoffs. The noninstrument approach zone shall have a width of five hundred (500) feet at a distance of two hundred (200) feet beyond each end of the runway, widening thereafter uniformly to a width of two thousand five hundred (2,500) feet at a distance of ten thousand two hundred (10,200) feet beyond each end of the runway, its centerline being the continuation of the center line of the runway."

Section 4 states:

> "Except as otherwise provided in this ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any zone created by this ordinance to a height in excess of the height limit herein

established for each zone. Such height limitations are hereby established for each of the zones in question as follows:

* * * * *

"(2) **Noninstrument approach zones:** One foot in height for each forty (40) feet in horizontal distance beginning at a point two hundred (200) feet from and at the elevation of the end of the noninstrument runway and extending to a point ten thousand two hundred (10,200) feet from the end of the runway."

The Cheyenne airport zoning ordinance, in contrast to many exercises of municipal zoning which are concerned with purely local matters, was passed under the authority and direction of both state and federal legislative bodies and was designed to protect both state and federal interests. To appreciate this blending of powers and authority, we must briefly examine the legal beginnings of the air age.

The federal goverment initiated the era of commercial air travel in 1926 with the enactment of the Air Commerce Act of 1926, 49 U.S.C. § 171, which in part declared a "public right of freedom of interstate and foreign air navigation" in the navigable airspace of the United States. Subsequent amendments preserved this declaration. 49 U.S.C. § 403 (1938); 49 U.S.C. § 1304 (1958); 49 U.S.C. § 1304 (supp. 1984).

The State of Wyoming made, in 1931, a similar declaration of right of public passage through the navigable airspace. Section 10-4-302, W.S. 1977, asserts:

"The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of flight described in W.S. 10-4-303 * * *."

Section 10-4-303, W.S. 1977, provides:

> "(a) Flight in aircraft over the lands and waters of this state is lawful unless it is:
>
> "(i) At such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owners;
>
> "(ii) Conducted as to be imminently dangerous to persons or property lawfully on the land or water; or
>
> "(iii) In violation of the air commerce regulations promulgated by the department of transportation of the United States."

Wyoming intended that its declaration and limitations be compatible with those of the federal government. Section 10-4-304, W.S. 1977, states:

> "W.S. 10-4-101 through 10-4-304 shall be construed as to effectuate its general purpose to make uniform the law of those states which enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of aeronautics."

The air commerce regulations alluded to in §§ 10-4-303(a)(iii) and 10-4-304 have, according to John Wood, manager of the Cheyenne airport, specified that approach zones to airport runways be free from obstacles, but they have not specified the method by which this is to be accomplished by state and local governments. Presumably, exercises of eminent domain, police power and negotiated purchase would be equally satisfactory.

The State of Wyoming, in response to these regulations, has specifically authorized its municipalities to zone the approaches to airport runways. Section 10-5-301, W.S. 1977, states:

> "(a) The governing body of each incorporated Wyoming municipality and county may regulate and restrict by ordinance the number of stories and size of buildings and the height of other structures constructed upon land within one-half (½) mile of the boundaries of airports owned or controlled by the town, city or county. They may provide zoning for airspace beyond one-half (½) mile of the boundaries and within the county, to assure aircraft reasonable safety for visual and instrument approach and departure. The right to zone shall be confined to the geographical limits of the current applicable approach zone established by the federal aviation administration for the particular airport and in no case shall the right to zone extend beyond six (6) nautical miles along the approach path from the end of the instrument runway."

This provision, permissive and not mandatory in nature, was the basis for the municipal exercise of zoning powers by the City of Cheyenne in adopting §§ 3 and 4, supra, of the Cheyenne Municipal Zoning Ordinance in 1974.

The ordinance was initially designed to operate prospectively and it, therefore, preserved rights in nonconforming uses which had vested on the effective date of the ordinance, § 6 providing that

> "[t]he regulations prescribed by this ordinance shall not be construed to require the removal, lowering, or other changes or alteration of any structure or tree not conforming to the regulations as of the effective date of this ordinance."

However, such vested rights do not include the right of expansion. The ordinance specifically states that new growth

or new additions on vested nonconforming uses are prohibited. Section 7(b) of the ordinance provides, in part, that:

> "No permit shall be granted that would allow the establishment of or creation of an airport hazard or permit a nonconforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this ordinance * * *."

This section codifies the general rule that expansion of a legally protected nonconforming use is not allowed. See Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

The impact of these sections is to impose an ongoing duty of trimming on the owners of legally protected nonconforming trees. In this case, however, appellees did not make periodic trimmings of their cottonwood and, as stated, it grew to 48 feet at the time of trial. At that point, the pruning necessary to bring the tree into compliance with the ordinance would, according to David Powell, an arborist, quite likely have killed the tree which in his opinion was worth $2,064.

Irrespective of the silvicultural difficulties of pruning such a mature cottonwood, airport officials notified the Rogerses in July of 1982 that the tree was in violation of its protected nonconforming use status, and that the Rogerses would either have to trim it or the airport board would trim it at the Rogerses' expense.

The Rogerses would not accede to this ultimatum. After an unsuccessful attempt to procure advance damages from the City, they posted their property against unauthorized entrance and maintained their refusal to cut the tree. During this time, the Rogerses made no attempt to use the variance procedure provided for in the ordinance. The City of Cheyenne, therefore, was not afforded an opportunity to consider granting a conditional variance or other relief if appropriate in accordance with § 7(d) of the zoning ordinance which provides,

in pertinent part, as follows:

"Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this ordinance, may apply to the planning commission for a variance from such regulations. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but will do substantial justice and be in accordance with the spirit of this ordinance."

On April 12, 1984, the Rogerses commenced this litigation seeking a declaration that the ordinance was unconstitutional, both on its face and as applied to their property, and an injunction against enforcement of the ordinance. With regard to their contention that the ordinance violated both the Wyoming and United States Constitutions, the Rogerses claimed that the ordinance represented an uncompensated taking of an easement in the airspace above their property and, also, would effect an unconstitutional taking if applied to the cottonwood tree in question or future trees that might penetrate into the zoned airspace.

The Rogerses' case was tried to the district court on September 20, 1984, and on October 19, 1984, the trial judge issued an order declaring:

> "Section 4(2) of Appendix B of the City Code of the City of Cheyenne * * * to be unconstitutional as applied to the plantiffs herein as being without just compensation or due process of law."

Furthermore, the trial court permanently enjoined the City of Cheyenne and the Cheyenne Airport Board from the enforcement of Section 4(2) against the Rogerses.

Though somewhat unclear as to scope, the trial judge's ruling may not only have found the ordinance to be unconstitu-

tional as applied but unconstitutional on its face as well. Though the order of October 19 declares the unconstitutionality to be only in the application to the Rogerses, it also purports to incorporate by reference the court's comments which were made at the conclusion of the parties' evidence. The trial judge said at that time, with regard to the ordinance as a whole:

> "I think there is no question here that private property is sought for the public's good and safety and that compensation should be paid. I find that this is not strictly an exercise of police power. It is similar to the construction of a highway * * * the City should condemn and a jury should decide what the damages are to the property by the City's taking."

Thus, it appears that the trial court declared the ordinance to be unconstitutional both as applied to the Rogerses' tree and future surface uses and to the extent that it created an overflight easement without the payment of compensation. As so viewed, the following distinct issues are presented for review:

> 1. Was an actual flight easement taken in the appellees' airspace? If so, is compensation necessary to the validity of such an interest?
>
> 2. Is the municipal zoning ordinance, to the extent that it restricts surface uses, a valid exercise of the police power, both in general and as applied to the appellees?

In addressing the issue of whether a compensable easement has been taken in the appellees' airspace, we first note that both the federal government and the State of Wyoming have declared a general right of free public passage through the air. The federal provision, 49 U.S.C. § 1304 (1958) (as amended, Supp. 1984), declares on behalf of all citizens, a

public right of freedom of transit through the navigable airspace. Section 10-4-303, W.S. 1977, declares that private ownership of the surface is vested subject to the lawful right of flight.

These statutes can be viewed as either the uncompensated appropriation of an easement of flight as an aspect of the public domain, or as a redefining of the recognized extent of legally protectable property. The courts, understanding the need for an accommodation between modern air travel and common law property concepts, and recognizing that rigid notions of compensation for all intrusions ad coelum would effectively preclude commercial air travel, have consistently held, in cases since the federal and state declarations, that surface owners have no cause of action in trespass nor constitutional claim for uncompensated taking unless the exercise of the flight easement by aircraft produces nuisances-- such as impacts on the surface. Thus, in the pivotal case of United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), the Supreme Court of the United States held that compensation to surface owners would be necessary only when overflights were so low and so frequent as to substantially interfere with the use and enjoyment of the property.

The subsequent case of Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962), dealt with overflights emanating from a county-owned airport and crossing property zoned for residential use. The Court held that the overflights would constitute a taking with the necessity of just compensation if such operations made residential use "unbearable" and thus made the property unuseable for its authorized purposes. 369 U.S. at 87-88.

Though some jurisdictions have not insisted on a direct invasion of the airspace for a taking claim (see e.g. Aaron v. City of Los Angeles, 40 Cal.App.3d 471, 115 Cal.Rptr. 162 (1974), cert. denied 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975)), these jurisdictions uniformly require that for a cause of action to exist, a property owner must suffer a

substantial interference with the use and enjoyment of the surface. See Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied 371 U.S. 955, 83 S.Ct. 506, 9 L.Ed.2d 502 (1963), and Annot., 22 A.L.R.4th 863 (1983). See also § 10-4-303(a), W.S. 1977, which codifies this requirement providing that overflight is lawful unless it is:

> "(i) At such a low altitude as to interfere with the exisiting use to which the land or water, or the space over the land or water, is put by the owner;
>
> "(ii) Conducted as to be imminentiy dangerous to persons or property lawfully on the land or water; or
>
> "(iii) In violation of the air commerce regulations promulagted by the department of transportation of the United States."

In the present case, the Rogerses have not contended, nor was evidence presented showing, that flights from the Cheyenne airport have caused substantial interference with the use and enjoyment of their residential property. All that was shown was that planes were flying in the airspace that the state and federal governments have reserved for lawful air travel. This court, under precedent and logic, must hold that such a showing does not establish a cause of action or constitutional claim.

We note also in passing that even if a proper claim based on overflight alone were presented, that such claim would arise either when the United States and Wyoming declared a public right of free transit through the navigable airspace (see 29 U.S.C. § 1304 (1958) (as amended Supp. 1984) and § 10-4-302, W.S. 1977), or no later than the date of the first airplane overflight. The Rogerses made no claim for the use of the easement in the airspace until April 12, 1984, and then the claim was directed only against the City of Cheyenne and the airport board. Section 1-3-103, W.S. 1977, provides that an action for the recovery of title or possession of lands, tenements

or hereditaments can only be brought within ten years after the cause of action accrues. Cases from other jurisdictions indicate that the running of such statutes of limitations bar subsequent claims of inverse condemnation. See Annot., 26 A.L.R.4th 68 (1983). Thus, § 1-3-103, supra, would seemingly preclude a claim (had such a claim even been made) that the federal or state government had taken a general flight easement by either their declarations of public right or by their use of the airspace.

The Cheyenne Municipal Airport Zoning Ordinance, No. 1969, §§ 1-15, Code Appendix B, was adopted on October 15, 1974. Appellees claim that the declaration of a flight easement in the ordinance was an unconstitutional taking and within the ten-year limitation provided for by § 1-3-103, W.S. 1977. This court does not, however, view the ordinance itself as the actual creator or appropriator of the flight easement, as this was either accomplished by the state and federal statutory declarations or by the repeated physical acts of overflight. Instead, we view the Cheyenne ordinance as an exercise of delegated police powers which was intended to *protect* the easement from activities on the surface. The impact of the police power zoning regulation on the actual and potential surface activities raises certain other legal and constitutional issues, which we will discuss infra.

To conclude this first segment and to preface our discussion of the ordinance as an exercise of the police power, we reiterate our belief that the mere fact of overflight without evidence of impact on the surface, does not create a constitutional claim against either the City of Cheyenne or the airport board for the unconstitutional taking of a flight easement. In addition, the flight easement utilized by airplanes was not taken by the passage of the city zoning ordinance, but by federal and state declarations of public navigability and by repeated overflights which preceded this action by consideraby more than ten years allowed by the statute of limitations pertaining to real property actions. Finally, we hold that the city ordinance

is properly viewed as an exercise of police power designed to protect this long-existent flight easement. As such it raises discrete issues of constitutional and legal validity, and we turn now to a discussion of these issues.

The police power can be generally described as a government's ability to regulate private activities and property usage without compensation as a means of promoting and protecting the public health, safety, morals and general welfare. See Weber v. City of Cheyenne, 55 Wyo. 202, 97 P.2d 667, 670 (1940). Zoning is a particular exercise of the police power. It involves the division of land into zones and within these zones the regulation of both the nature of land usage and the physical dimensions of these uses including height setbacks and minimum area. Airport zoning, as a more refined exercise, deals with the regulation of the type of land activities and their physical dimensions in the immediate vicinity of airports. The general purpose of such airport zoning is to prevent conflict from emerging between adjacent landowners and their uses and airplane overflights.

There are several potential limitations on the local employment of airport zoning, some of which pose no real problem in this case. In one basic sense, local zoning must be authorized, as even after home rule amendements, municipalities remain largely the creatures of the sovereign state and in need of specific delegations of powers. This is especially so with regard to subjects like airports and their regulation which clearly are matters of statewide significance. The Wyoming legislature, as a means of protecting the state-declared public flight easement passed an enabling act, § 10-5-301, W.S. 1977, supra.

Even after enabling legislation is passed and local regulation is authorized, the local grants of power with regard to matters of statewide concern can be preempted by either subsequent state legislation or federal power exercises. With regard to the case at bar, it is clear that the state has not amended its specific delegation of power to the municipalities, and that

the federal regulations continue to insist on obstruction-free approach zones.

Constitutional limits, however, stand apart from the authorization of either federal or state bodies and bind not only the recipients of delegated powers but also the delegators. The federal constitutional limits contained in the Bill of Rights apply directly to federal officials and to agencies, such as the Federal Aviation Agency, and indirectly to the states through the Fourteenth Amendement which, in part, imposes its own direct limits of due process and equal protection on state actions, and also imposes other limits from the federal Bill of Rights which are deemed incorporated into the concept of due process and thus made applicable to the states. State constitutions may add to these limitations and may be more protective of indiviual liberties. They may not, however, under the dictates of supremacy, be less protective. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); see generally Brennan, **State Constitutions and the Protection of Individual Rights,** 90 Harv. L.Rev. 489 (1977).

Both the United States Constitution and the Wyoming Constitution impose due process limitations on exercises of the police powers. The Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, § 6 of the Wyoming Constitution all assert that no person shall be deprived of life, liberty or property without due process of law. In general, Wyoming has, in zoning cases, interpreted its due process provision in a manner parallel to the federal provisions. See e.g. Board of County Commissioners of Teton County v. Teton County Youth Services, Inc., Wyo., 652 P.2d 400, 414 (1982).

The due process clause has both a procedural and a substantive aspect. State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938). In the case at bar the trial court declared that Cheyenne's airport zoning ordinance failed to meet constitutional standards of substantive due process. For the reasons that follow, we cannot agree with this conclusion.

The constitutional standard of substantive due process, under both United States and Wyoming interpretations, demands that a police power regulation must promote a legitimate public objective with reasonable means. The substantive due process standard of reasonableness is applicable during the initial legislative process and theoretically confines the legislators. The judiciary may, in the context of an actual case, be called on to measure the legislative performance against the constitutional standard. When the legislative enactment lies in the economic and social welfare area, and when there are no suspect criteria or fundamental interests involved, the court will, in testing the enactment, inquire only as to whether the regulation is of debatable reasonableness. In other words, if the court perceives that the legislature had some arguable basis for choosing the end and the means, it will sustain the regulation at least as to compliance with substantive due process. Only when a regulation amounts to an arbitrary deprivation of regulatees' property will it be deemed to violate the dictates of substantive due process. As we said in Washakie County School District No. One v. Herschler, Wyo., 606 P.2d 310, 333 (1980), cert. denied 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28:

> "When an ordinary [nonfundamental constitutional] interest is involved, then a court merely examines to determine whether there is a rational relationship between a classification * * * and a legitimate state objective."

In the present case the appellees sought, and the trial court apparently granted, a declaration of the ordinance's general or facial invalidity under substantive due process. We conclude, for reasons that follow, that the ordinance does comply with the requirements of substantive due process and that the trial court's contrary conclusion is erroneous.

The legitimate objectives of the police power are loosely characterized as being public in nature and the potential range

is very broad. See Hawaii Housing Authority v. Midkiff, _____ U.S. _____, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); Berman v. Parker, 348 U.S. 26, 75 S.Ct 98, 99 L.Ed. 27 (1954). There is no real dispute in this case that the objectives of the Cheyenne airport zoning ordinance are both public and legitimate. The trial judge, in fact, stated:

> "I think there is no question here that private property is sought for the public's good and safety * * *."

As to the means chosen by the Cheyenne council to achieve these objectives, we reiterate that, in the economic and social welfare area and when the ordinance is examined in a general, facial manner, the courts will usually go no further than to ascertain the debatable reasonableness of the legislative choices. See Snake River Venture v. Board of County Commissioners, Teton County, Wyo., 616 P.2d 744, 753 (1980). The United States Supreme Court, in dealing with general, facial challenges to local exercises of police power, has sustained the substantive due process reasonableness of a number of facets of local zoning. Thus, in Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926), the Court determined that in a general sense, it is constitutionally reasonable and in accord with substantive due process for a local legislature to use comprehensive zoning and its uncompensated restrictions on use and bulk in order to promote the health, safety, morals, and general welfare. In Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210 (1927), the Court upheld the general reasonableness of zoning setbacks and their requirement that portions of plots be left unbuilt. In Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), the Court upheld the general reasonableness of local zoning restrictions on excavations below the depth of the water table. In Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court sustained the general con-

stitutionality of height limitations that New York City imposed to protect historic and aesthetic landmarks. See also Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909).

These Supreme Court precedents do not address the specific issues of airport zoning and its general validity under the standards of substantive due process. We note, however, that they do deal with zoning provisions and restraints on the portions of property that can be physically used. Thus, the United States Supreme Court has sustained the general constitutional reasonableness of restrictions on the depth of activities in the subsoil (Goldblatt v. Town of Hempstead, New York, supra), the lateral extent of activities on the surface (Gorieb v. Fox, supra, and Village of Euclid, Ohio v. Ambler Realty Co., supra), and the height of activities in the airspace (Penn Central Transportation Co. v. City of New York, supra). We hold, therefore, that to the extent that the lower court in the present case purported to enjoin airport zoning in general as contrary to the demands of substantive due process, it was in error.

Substantive due process, with its emphasis on legitimate objectives and rational means, can be explored and applied in a general sense when the reasonableness of the entire ordinance or statute is in question. See e.g. Village of Euclid, Ohio v. Ambler Realty Co., supra. It can also be examined in a specific sense, when the court evaluates the reasonableness of a law as applied to an individual. See Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). In a case with some similarities to the one at bar, the Supreme Court sustained the specific reasonableness of a regulation that resulted in the destruction of one party's ornamental cedar trees in order to save local apple crops from cedar rust.

> "The Supreme Court held that the trees could be destroyed by the state without incurring any constitutional duty to compensate the injured landowner. The Court observed that apple production was an

> important agricultural activity in Virginia while the ornamental cedar trees had only minimal importance. The Supreme Court concluded that '[w]hen forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another, which, in the judgement of the legislature, is of greater value to the public.' Like the zoning-property use decisions, this case comports with modern substantive due process analysis by allowing the government to determine how to deal with societal problems without strict judicial review." (Footnote omitted.) J. Nowak, R. Rotunda, J. Young, Constitutional Law 490 (2d ed. 1983).

Though there are examples of cases that deal with substantive due process as applied in particular cases, see e.g. Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), most cases that deal with the particular impact of a land use regulation do so under the provisions of the taking clause. The appellees in the present case made several arguments based upon the taking clause, and the trial court accepted them. We next consider the limitations posed by the taking clause provisions.

The Fifth Amendment to the United States Constitution states in part: "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment which directly binds the states does not have a taking provision but it was early held that the Fourteenth Amendment due process clause incorporates the concepts and limitations of the taking clause. Chicago Burlington and Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). The Wyoming Constitution, Art. 1, § 33, states that

"[p]rivate property shall not be taken or damaged * * * without just compensation."

The taking clauses have three possible areas of application. They serve to confine formal exercises of the soverign power of eminent domain. They apply to cases where governmental action effectively takes or destroys a private interest in property. These situations are described as inverse condemnation. Finally, the clause can cover those situations where the impact of a regulation is deemed to be too severe to be borne without payment of just compensation. We will look with more particularity at the latter two situations as they are alleged to exist in this case.

Inverse condemnation which is generally a physical taking in fact, as opposed to a taking by formal procedure, can involve situations where the government or those acting under government auspices physically occupy all or part of a private estate in land. If such occupation exists, then just compensation is owed for the interest in exclusive possession that has been appropriated. See Sheridan Drive-In Theatre, Inc. v. State, Wyo., 384 P.2d 597 (1963). It is significant to note that when government actively takes an interest in property through physical occupation, it is usually obligated to pay the fair market value of the interest acquired--without regard to the value of the property remaining in private hands. See Loretto v. Teleprompter Manhattan CATV, Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), where the Supreme Court found that an ordinance, that authorized cable television companies to install receivers on private buildings, amounted to the taking of a compensable easement--without regard to the remaining value of the building to the private owner.

Perhaps the clearest example of an inverse condemnation occurs when the government floods private property without the prior payment of compensation. See Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 13 Wall. 166, 20 L.Ed. 557 (1871). Less clear but still covered situations would include intrusions on private property by members of

the public pursuant to governmental authorization. Thus, Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), the Supreme Court held that the federal government could not require the owners of a private marina to allow the public free access without the payment of just compensation.

Airplane overflights can constitute inverse condemnation but as noted earlier, the courts have generally not found a taking from mere passage through the airspace. Rather, as held in United States v. Causby, supra, 328 U.S. 256, flights over private land are not deemed a taking unless so low and so frequent as to be a direct and substantial interference with the use and enjoyment of land. See Annot., 57 L.Ed.2d 1254, 1260-1261 (1978). As noted, the appellees in this case have not demonstrated any evidence of substantial interference with the use and enjoyment of the surface. There is, therefore, no basis for an allegation of inverse condemnation due to overflight.

We turn now to a discussion of the zoning ordinance and whether its regulatory impact on appellees' land amounts to a taking. We have previously discussed our conclusion that the municipal ordinance does not itself amount to the compensable taking of an affirmative easement in the airspace. Rather, the flight easement was initially taken by federal and state declaration and by actual uses, and the ordinance serves merely to protect this affirmative easement. The appellees, however, have also argued that the protective effect of the zoning ordinance is to create a **negative** easement without compensation. A negative easement theoretically involves only a servient tenement and not a dominant one. The owners of such servient tenements would, by virtue of the negative easement, be precluded from the full spatial usage of their property. The holder of a negative easement has, by virtue of such an interest, no right to active use; rather the holder can merely insist that the burdened party refrain from certain uses or uses in certain areas.

In the present case, the appellees insist that their property is burdened by a negative easement because they are precluded from building or allowing their trees to extend above the ordinance's height limit. The appellees assert that such negative easements represent property interests taken by the government even though the government is not an active user and that such takings require compensation without regard to the remaining value of the regulated plot.

The Supreme Court of the United States chooses not to view zoning setbacks and height limits as the creation of compensable negative easements. This argument was raised in Penn Central Transportation Co. v. City of New York, supra, and the majority replied that extensive precedent precluded this argument.

> "These cases [Welch v. Swasey, Goldblatt v. Hempstead, Gorieb v. Fox, supra] dispose of any contention that might be based on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably--i.e., irrespective of the impact of the restriction on the value of the parcel as a whole--constitutes a 'taking.' Similarly, Welch, Goldblatt, and Gorieb illustrate the fallacy of appellants' related contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." 438 U.S. at 131 n.27.

Rather, the Supreme Court views the situation where a landowner is restrained in his use of one spatial area of his property--his airspace, side yard or subsoil--as merely one species of use regulation. The Court thus presumes that no

actual property in these cases had been appropriated by the government and an unconstitutional taking will be found only if the regulation fails the balancing test first articulated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321 (1922).

Under Justice Holmes' reasoning in Pennsylvania Coal Co. v. Mahon, the taking clause application was expanded beyond the formal eminent domain and inverse condemnation of physical interest in property. Under Pennsylvania Coal Company's balancing test, a regulation can also be deemed invalid as an uncompensated taking if it goes to far in its restrictions on the *use* of property. This situation can be clearly differentiated from cases where the government appropriates actual easements as there are no necessary physical or spatial aspects. Instead, the regulation's impact on *usage* is the key.

The taking through excessive use regulation is also differentiated from cases of formal or inverse condemnation of actual property interest in that, when the government takes an actual easement, it must pay the fair market value of the interest taken, regardless of the value of the remaining plot. See Loretto v. Teleprompter Manhattan CATV, Corp., supra, 455 U.S. 419. In the excessive regulation cases, the remedy, where the regulatory impact has gone too far, has generally been limited to a declaration of unconstitutionality and an injunction. See Penn Central Transportation Co. v. City of New York, supra, 42 N.Y.2d 324.

The application of the balancing test involves a comparison of the substantiality of the public interest with the impact upon the individual. Though such a comparison can conceivably be made when the general constitutionality of a regulation is questioned, see Pennsylvania Coal Co. v. Mahon, supra, the vast bulk of regulatory taking cases have involved instances of specific application. To the extent that the appellees in the present case have alleged an unconstitutional regulatory taking, it is clear that their focus is on the specific application of the regulation to their plot and not on all the impacts that might

stem from the entire ordinance.

The balancing test and the components of comparison are not rigidly fixed. However, certain relevant factors can be identified and certain principles as to how these factors should be treated have been established in the Supreme Court opinions.

In assessing the substantiality of the government interest, the courts may be concerned with whether the regulation can be characterized as designed to prevent a harm (the theoretical province of the police power) or intended to secure a benefit (the theoretical province of eminent domain). If the regulation is deemed to be directed at a potential harm, the courts are then concerned with the harm's imminence, its severity, and how likely the law is to be successful in preventing the harm. See J. Nowak, R. Rotunda, J. Young, Constitutional Law 492; see also United States v. Caltex, 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157 (1952); and United States v. Central Eureka Mining Company, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958), where the regulations were reasonably designed to prevent imminent, severe wartime harms. The substantial governmental interest in the regulations thus permitted a high degree of impact on private property without exceeding the taking clause limits.

The Supreme Court has clearly stated that the impact to be considered and balanced is the impact of the regualtion on the plot as a whole. The impact of the regulation on discrete segments is not relevant. In Penn Central Transportation Co. v. City of New York, supra, the Court said:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the

> parcel as a whole--here, the city tax block designated as the 'landmark site.' " 438 U.S. at 130-131.

In assessing the impact of the regulation on the plot as a whole, the more relevant of the elements a restrained landowner can show are: the near-complete frustration of investment-backed expectations; the diminution of the property's market value as a result of regulation; and, perhaps most significantly, the absence of a reasonable remaining economic use. See Penn Central Transportation Co. v. City of New York, supra, 438, U.S. at 127-137. The plantiff has the burden of establishing these claims. If he fails to do it, the court will not presume the impact. In describing the result in Goldblatt v. Hempstead, supra, the Court in Penn Central Transportation Co. v. City of New York, supra, said:

> "Goldblatt v. Hempstead, supra, is a recent example. There, a 1958 city safety ordinance banned any excavations below the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a 'taking' challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had, like the regulations in Miller and Hadacheck, severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occured." 438 U.S. at 126-127.

In addition, if the plaintiff fails to utilize available administrative procedures such as those allowing variances, the courts may also find that impact has not been clearly shown. Penn Central Transportation Co. v. City of New York, supra, 438 U.S. at 137.

In the case at bar, the appellees have alleged a taking pursuant to the airport zoning ordinance's height limit as to both the cottonwood tree presently exceeding the height limit, and the future trees or possible residential additions which may be affected. As previously noted, the uniform treatment of this claim precludes the characterization of such restricted plot usage as the compensable appropriation of a property interest in the airspace. Therefore, this facet of appellees' claim depends on application of the balancing test and a comparison of the substantiality of the government interest and the impact on the plot as a whole.

In assessing the impact on the plot as a whole, it is noteworthy that the Rogerses made no attempt to use the variance procedure contained in § 7(d) of the zoning ordinance. The municipality might, if appellees had made the necessary showings, have granted a variance for the tree and for possible future uses. In such an event, the regulatory impact of the ordinance would have been alleviated. Appellees' failure to use the variance provision denies the municipality an administrative means of protecting its ordinance from constitutional challenges and of fashioning indiviual relief in accord with both justice and the spirit of the ordinance. See Baggett v. City of Montgomery, 276 Ala. 166, 160 So.2d 6 (1964).

It is also noteworthy that appellees purchased the zoned property after the ordinance had been in effect for almost two years, a fact that indicates it unlikely that appellees have suffered loss of "distinct, investment-backed expectations." Penn Central Transportation Co. v. City of New York, supra, 438 U.S. at 127. Finally, the required existance of impact does not appear, for appellees' residential usage of the plot was not noticeably affected until 1982 when the height of a single tree

became legally problematic.

With regard to this particular cottonwood, appellees claim that the ordinance as applied will result in a loss of $2,064. It seems likely that the loss would have been substantially less if appellees had complied with the ordinance in 1976 and periodically trimmed the tree and not allowed it to substantially exceed the allowed height. It also is apparent that this figure is far less than the value of the plot for residential purposes.

In summation, the cases involving taking, including those cited by the appellees for the proposition that the particular application of airport zoning effects a taking, have almost always involved situations of substantial or nearly total restriction of plot usage or value. The appellees have failed to demonstrate such a significant impact as to counterbalance the significant public interest in protecting the airport flight path.

For the reasons enunciated, the judgment of the trial court is reversed.

APPENDIX B

IN THE SUPREME COURT

STATE OF WYOMING

CHEYENNE AIRPORT BOARD and CITY OF CHEYENNE,	)	OCTOBER TERM, A.D. 1985
Appellants (Defendants),	)	
vs.	)	No. 84-301
TERRY ROGERS and BRENDA ROGERS,	)	
Appellees (Plaintiffs).	)	

FILED
In The Supreme Court
State of Wyoming
NOV 4 1985
M. J. Coonrod
CLERK

ORDER DENYING MOTION TO SUPPLEMENT RECORD AND PETITION FOR REHEARING

This case came on before the court upon the Motion to Supplement the Record Regarding "Ripeness" Issue, Appellees' Petition for Rehearing and brief in support thereof filed herein on behalf of the appellees, and the court having examined the files and record of the court and being fully advised in the premises, and having considered carefully the Motion to Supplement the Record Regarding "Ripeness" Issue, Appellees' Petition for Rehearing and the brief finds they should be denied, and it therefore is

ORDERED that the Motion to Supplement the Record Regarding "Ripness" Issue filed herein be, and the same hereby is denied. It is further

ORDERED that Appellees' Petition for Rehearing be, and the same hereby is, denied.

November 1, 1985

By the Court
RICHARD V. THOMAS
Chief Justice

APPENDIX C

IN THE DISTRICT COURT

FOR THE FIRST JUDICIAL DISTRICT

LARAMIE COUNTY, STATE OF WYOMING

TERRY ROGERS and BRENDA ROGERS, Plaintiffs,	)	
vs.	)	No. 104-94
CHEYENNE AIRPORT BOARD and CITY OF CHEYENNE, Defendants.	)	FILED District of Wyoming OCT 19 1984 Gerrie E. Bishop CLERK

DECLARATORY JUDGMENT AND INJUNCTION

THE ABOVE ENTITLED MATTER, having come before the Court for a trial on the 20th day of September, 1984, and the plaintiffs having, prior to the introduction of evidence, requested the Court to enter its findings of fact and conclusions of law herein, and the Court having considered the evidence adduced by the parties and their counsel, and having heard the arguments of counsel and the briefs filed herein, does find in favor of the plaintiffs and against the defendants upon plaintiffs complaint and does hereby order and adjudge as follows:

IT IS ORDERED that the Court's comments at the conclusion of the proceedings herein are hereby incorporated herein by reference as the Court's findings of fact and conclusions of law as requested by plaintiff.

FURTHER IT IS ORDERED, ADJUDGED, and DECREED that the ordinance herein, to wit, Section 4(2) of Appendix B of the City Code of the City of Cheyenne is hereby declared to be unconstitutional as applied to the plaintiffs herein as being without just compensation or due process of law.

FURTHER IT IS ORDERED, ADJUDGED and DECREED, that the defendants herein, to wit, the City of Cheyenne and the Cheyenne Airport Board are hereby permanently enjoined from enforcement of Section 4(2) of Appendix B of the City Code of the City of Cheyenne against plaintiffs.

FURTHER IT IS ORDERED, ADJUDGED and DECREED that the plaintiffs recover herewin their costs to include filing and service fees, costs of the deposition of John Wood, a reasonable fee for expert testimony herein, and the reporter's fee, all in the amount of Two Hundred eighty dollars and twenty cents ($280.20), as evidenced by plaintiffs counsel's Affidavit of Costs.

DONE IN OPEN COURT, this 19th day of October, 1984.

Paul T. Liamos
District Judge

APPENDIX D

IN THE DISTRICT COURT

FOR THE FIRST JUDICIAL DISTRICT

LARAMIE COUNTY, STATE OF WYOMING

TERRY ROGERS and BRENDA ROGERS,	)	
Plaintiffs,	)	
vs.	)	No. 104-94
CHEYENNE AIRPORT BOARD and CITY OF CHEYENNE,	)	
Defendants.	)	

BEFORE: The Honorable PAUL T. LIAMOS, JR., Judge Presiding.

APPEARANCES

MR. BERNARD PHELAN, Attorney at Law, 402 Rocky Mountain Plaza, Cheyenne, Wyoming 82003.
ATTORNEY FOR THE PLAINTIFFS.
MR. JOHN PATTON, Carmichael, McNiff & Patton, 1920 Thomes, Suite 600, Cheyenne, Wyoming 82003.
ATTORNEY FOR THE DEFENDANT CHEYENNE AIRPORT BOARD.
MR. R. WALTER CONNELL, Assistant City Attorney, Municipal Building, 2101 O'Neil Avenue, Cheyenne, Wyoming 82001.
ATTORNEY FOR THE DEFENDANT THE CITY OF CHEYENNE

BE IT REMEMBERED that on the 20th day of September, 1984, at Courtroom C, Third Floor, City and County Building, Cheyenne, Laramie County, Wyoming, the above-entitled matter came on for hearing before The Honorable Paul T. Liamos, Jr., Judge Presiding, whereupon the following proceedings were had, to wit:

THE COURT: Well, thank you, gentlemen, it is an interesting question and certainly this is an area in which homes were constructed and people are living there in that residential area. People reside in the homes and they generally landscape the area to plant trees. It appears to be a reasonable use. It's said that it's been a residential area and I'm sure that the zoning describes how many stories, how many families can live in a particular lot or abode or structure. What is presented here, I think, is a reasonable use of the property, a use of property for which it's intended. I don't believe that the ordinance is contrary to this use. I think the ordinance provides for the authority for any necessary action for the City to act for the health and safety of the people, and in this instance I believe it is the authority for the City to condemn. I think there is no question here that private property is sought for the public's good and safety and that compensation should be paid. I find that this is not strictly an exercise of police power. It is similar to the construction of a highway and other things that a City and State, et cetera, must do, that they do it within the Constitution and property must be respected. So I would find that the reasonable use of the — It's a reasonable use of the land and their using it for the purpose which is intended. In other respects being legal of that use, in the opinion of the City, is interfering with the use of the airport, the City should condemn and a jury should decide what the damages are to that property by the City's taking.

The Court would request that Mr. Phelan prepare the judgment and the findings of facts and conclusions of the law as given here by the Court. Is there anything that should come to the attention of the Court? One thing the Court wants to put on the record, the deposition of Mr. Woods, marked Exhibit

24, it will accompany all the other exhibits. I marked it for identification and it won't be in the Court file but with the exhibits. The Court is going to turn the exhibits over to the reporter and the Court will grant the prayer of injunction enjoining the City from interfering with the Plantiffs' use of their property by allowing this tree to remain there untrimmed and growing, et cetera, and requiring — enjoining them from requiring the Plantiffs themselves to trim or otherwise dispose of the tree, and the Court will grant costs to the Plantiffs; The cost of filing the suit as far as the process, reasonable fees for any expert witnesses who have testified, the costs of the deposition of Mr. Wood. Is there anything else that should come to the attention of the Court now?

MR. PHELAN: No, Your Honor.

THE COURT: All right. Court will be in recess.

(Thereupon, the proceedings (were concluded.

REPORTER'S CERTIFICATE

State of Wyoming)
) SS
County of Laramie)

I, Mariam Marks, a notary public and court reporter in and for the First Judicial District, State of Wyoming, hereby certify that the facts as stated in the caption hereof are true; that I did at the time, date and place, as set forth, report the proceedings had before the Honorable Paul T. Liamos, Jr., Justice of the Peace, in stenotype; that the foregoing pages, numbered 1-3, inclusive, constitute a true, correct and complete transcript of all my stenographic notes as reduced to typewritten form under my direction.

I further certify that I am not agent, attorney or counsel for any of the parties hereto, nor am I interested in the outcome thereof.

Dated this 26th day of September, 1984.

Mariam Marks
Court Reporter

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF WYOMING

CHEYENNE AIRPORT BOARD and CITY OF CHEYENNE, Appellants (Defendants),	)	
vs.	)	No. 84-301
TERRY ROGERS and BRENDA ROGERS, Appellees (Plaintiffs).	)	FILED District of Wyoming NOV 4 1985 M. J. Coonrod CLERK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that TERRY ROGERS and BRENDA ROGERS, appellees above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wyoming, reversing the order of the lower court, entered in this action on October 8, 1985, and from the Order Denying Petition for Rehearing, entered by the Wyoming Supreme Court on the 1st day of November, 1985.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

DATED this 4th day of November, 1985.

TERRY ROGERS and
BRENDA ROGERS,
Appellees

BY: Bernard Q. Phelan
Attorney for Appellees
2020 Carey Avenue, Suite 402
P.O. Box 1841
Cheyenne, Wyoming 82003-1841

PROOF OF SERVICE

I, Bernard Q. Phelan, attorney for TERRY ROGERS and BRENDA ROGERS, appellees herein, depose and say, that I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on: A. G. McClintock, Attorney General of the State of Wyoming, State Capital, Cheyenne, Wyoming 82002; John C. Patton, Carmichael, McNiff and Patton, 1920 Thomes Avenue, Suite 600, P.O. Box 945, Cheyenne, Wyoming 82003-0945; and, Walter R. Connell, Assistant City Attorney, Municipal Building, 2101 O'Neil Avenue, Suite 308, Cheyenne, Wyoming 82001, by depositing the same in the United States mail, postage prepaid, this 4th day of November, 1985.

Affiant further states that all parties who are required to be served have been served as set forth above.

DATED this 4th day of November, 1985.

Bernard Q. Phelan

STATE OF WYOMING,)
)
COUNTY OF LARAMIE)

Subscribed and sworn to before me by Bernard Q. Phelan this 4th day of November, 1985.

Witness my hand and official seal.

Janet S. Hostetter
NOTARY PUBLIC

My Commission Expires: July 30, 1989

Supreme Court, U.S.
FILED
APR 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1257

In The
Supreme Court of the United States
October Term, 1985

TERRY ROGERS and BRENDA ROGERS,
Appellants,

v.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WYOMING
APPELLEE'S MOTION TO DISMISS

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Attorney for Appellee
City of Cheyenne

DATE: April, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

The substantive question in this case is whether the City of Cheyenne Municipal Airport Zoning Ordinance, providing a height limitation in a non-instrument approach zone to the Cheyenne Municipal Airport, is a violation of the United States Constitution as a taking of private property for public use without just compensation.

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ORDINANCES

Cheyenne Municipal Airport Zoning Ordinance Section 7(d) 1, 2, 7

Pursuant to Rule 16.1, the appellees, Cheyenne Airport Board and City of Cheyenne, move the Court to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question, or upon the ground that there is no final judgment upon which this Court can exercise its appellate jurisdiction.

—o—

STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 United States Code Section 1257 provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

Section 7(d) of the Cheyenne Municipal Airport Zoning Ordinance provides:

> (d) Variances. Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this ordinance, may apply to the planning commission for a variance from such regulations. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but will do substantial justice and be in accordance with the spirit of this ordinance.

Other pertinent, constitutional and statutory provisions have been supplied to the Court by the Appellants in their Jurisdictional Statement.

STATEMENT

On April 12, 1984, Terry Rogers and Brenda Rogers (Rogerses) brought an action in the First Judicial District Court for the State of Wyoming, praying that the Cheyenne Municipal Airport Zoning Ordinance be declared unconstitutional under the provisions of Article I, Section 7 of the Wyoming Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and for an injunction preventing enforcement of the ordinance. Following an adverse decision in that case, the Cheyenne Airport Board appealed to the Supreme Court for the State of Wyoming. The Wyoming Supreme Court reversed the trial court in *Cheyenne Airport Board v. Rogers,* 707 P.2d 717 (Wyo. 1985) and held that:

> a. there was no taking of a private interest in property by direct and substantial interference with the use and enjoyment of Rogerses' property which must be remedied by inverse condemnation; and
>
> b. the impact of the Cheyenne Municipal Airport Zoning Ordinance on the entire property is not so severe that it effects a taking without payment of just compensation. *Id.* at 729 and 732.

At no time in the trial court proceedings did the Rogerses claim, nor was evidence presented, that Rogerses' property was subjected to direct interference from airplane overflights or that overflights interfered with the use and enjoyment of their residential property. Contrary to the assertion of Appellants in their Jurisdictional Statement, the record is also completely void of any evidence that Appellants applied for a variance to the City of Cheyenne planning commission as they had the right to do under the provisions of Section 7(d) of the Cheyenne Municipal Airport Zoning Ordinance.

ARGUMENT

1. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Wyoming Supreme Court correctly applied the principles and standards articulated by this Court, and its decision does not conflict with other state court decisions which address a similar issue. In determining that the regulatory impact of the Cheyenne Municipal Airport Zoning Ordinance on Rogerses' property was not so restrictive as to constitute a taking, the Wyoming Supreme Court applied the law as stated in *Village of Euclid v. Ambler Realty Co.*, 365 U.S. 359 (1926) and in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The trial court found that the purpose of the ordinance was for the promotion of the public's safety and general welfare. The Wyoming Supreme Court reiterated that finding and found the ordinance to be in accord with substantive due process and the *Village of Euclid* case. *Cheyenne Airport Board*, 707 P.2d at 727.

The general principles discussed by this Court in *Penn Central Transportation Co. v. New York City* are the appropriate ones to be applied to restrictive zoning such as the Cheyenne ordinance in question. *Penn Central* dealt with architectural (including height) restrictions imposed upon private property. *Penn Central*, 438 U.S. at 116-118. That case upheld the restraints imposed upon the property owner and in so doing, stated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several

> factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct and investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra,* at 594. So, too, is the character of the governmental action. A "taking" may be more readily found when the interference with property can be characterized as a physical invasion by the government, see, *e.g., United States v. Causby,* 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. *Id.* at 124.

No evidence was presented in this case to demonstrate any interference with investment-backed opportunities contemplated by the Rogerses, nor of a particular impact on the residential use of their property as a whole. Without a showing that the height restriction constitutes a significant restriction on the use of their property as a whole, Appellants' suggested result is contrary to the standards of the *Penn Central* case. *Id.* at 125, 127 and 130-131.

No actual property has been appropriated from the Rogerses. Rather, they are being restrained in one spacial area of their property, a restriction also applied to neighboring and similar properties. This restriction upon one right found in the group of ownership rights which belong to Appellants was properly found to be permissible under the principles of this Court.

2. NO PHYSICAL OCCUPATION OF ROGERSES' PROPERTY EXISTS AND THE PRINCIPLES OF LORETTO v. TELEPROMPTER MANHATTAN CATV CORP. ARE INAPPLICABLE.

Contrary to Appellants' assertion in their Jurisdictional Statement, the *per se* analysis applied by the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) is inappropriate here. No evidence was presented below which would support the Rogerses' position that a physical occupation of their property has occurred. Intermittent aircraft flights are not equivalent to a permanent physical invasion such as that addressed by this Court in *Loretto*. No permanent physical occupation of Rogerses' property (the determinative factor in *Loretto*) has ever been demonstrated. *Id.* at 433-435. Appellants attempt to equate a height restriction and occasional overflights with a permanent physical occupancy by a governmental agency for the public use. That argument was addressed and properly rejected by the Wyoming Supreme Court. *Cheyenne Airport Board*, 707 P.2d at 729.

Appellants also argue that application of this Court's conclusions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) will change the result in this case. However, the Wyoming Supreme Court discussed this case in light of *Kaiser Aetna*, and rejected its applicability. *Cheyenne Airport Board*, 707 P.2d at 729.

In *Kaiser Aetna*, this Court stated that "the exercise of the public right of navigation over interstate waters that constitute highways for commerce" did not always require compensation. *Kaiser Aetna*, 444 U.S. at 175. The Court found a taking in that case because public

access was required on *Kaiser Aetna*'s private property. However, the determinative factor seemed to be *Kaiser Aetna*'s substantial investment in improvements rather than, or solely because of, the public access. The Wyoming Supreme Court correctly applied the required law and rejected the applicability of both *Loretto* and *Kaiser Aetna*.

3. THERE IS NO CONFLICT AMONG THE STATE COURTS WHICH HAVE ADDRESSED AIRPORT ZONING.

Results from state courts in cases dealing with airport zoning have been diverse. However, almost without exception those courts have applied the same principles in reaching their results. *See, e.g., Ackerman v. Port of Seattle,* 55 Wash. 2d 400, 348 P.2d 664, 671 (1960) (case in which the Washington Supreme Court found a taking because of continuous, frequent and low overflights); *compare Village of Willoughby Hills v. Corrigan,* 29 Ohio St. 2d 39, 278 N.E.2d 658, 663 (1972), *cert. denied,* 409 U.S. 919 (1972) (airport zoning found to be within the police power and valid). Those and other well-reasoned decisions have relied, *inter alia,* on this Court's holding in *United States v. Causby,* 328 U.S. 256, 266 (1946) and required a finding of direct, substantial interference with the use of the property before a taking could be found. *See, also, Griggs v. County of Allegheny, Pennsylvania,* 369 U.S. 84 (1962), *reh'g denied,* 369 U.S. 857 (1962). When a taking was found, the facts were particularly egregious.

The Wyoming Supreme Court applied the *Causby* test in reviewing the Rogerses' case. The court reached the appropriate result based upon the fact that Rogerses

had never " . . . demonstrated any evidence of substantial interference with the use and enjoyment of the surface." *Cheyenne Airport Board*, 707 P.2d at 729. Overflight simply was not an issue in the case, no interference with the property's use as a whole was shown, and there was no evidence of adverse surface impact.

4. THIS COURT MAY NOT HAVE JURISDICTION TO HEAR THIS APPEAL AS THE ROGERSES HAVE NOT APPLIED FOR A VARIANCE.

Appellees believe that further proceedings in this case will not produce a different result. Correct application of the law dictates that the case be affirmed. However, there may also be a procedural defect upon which the Court could decline jurisdiction.

The Cheyenne Municipal Airport Zoning Ordinance provides, in Section 7(d), for a procedure by which the Rogerses may apply for a variance from application of the ordinance to their property. At no time was variance application made to the City of Cheyenne. In light of this Court's recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S. Ct. 1381, 87 L. Ed. 2d 126, 147 (1985), the failure to apply for the variance may well be fatal to this appeal. A final administrative decision has not been rendered, and further proceedings could possibly dispose of the taking issue. If the case is not ripe for review, the Court has no jurisdiction to proceed. 28 U.S.C. § 1257.

In *Williamson County*, this Court also raised the issue of potential, contemplated inverse condemnation proceedings. *Id.* at 143; *see, also, Ruckelshaus v. Monsanto Co.*, — U.S. —, 104 S. Ct. 2862, 2878 (1984). The failure of Rogerses to bring an action for inverse condemnation in

the Wyoming courts should, however, not be fatal to this appeal. The Rogerses' right to bring such an action, although available pursuant to the Wyoming Statutes Section 1-26-516 (Supp. 1985), is precluded by the holding in the Wyoming Supreme Court that no taking has occurred. That holding will be *res judicata* on the taking question and no compensation could be awarded.

———o———

CONCLUSION

The decision in the Wyoming Supreme Court was correct and was based upon the proper application of settled principles of law articulated by this Court. The results from other state courts, when examined, do not conflict with the state court decision in this case. For those reasons, this case does not present a substantial federal question, and further proceedings would not produce a different resolution of the issue. This case should be dismissed.

Respectfully submitted,

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DATE: April, 1986

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1257

In The

Supreme Court of the United States

October Term, 1985

TERRY ROGERS and BRENDA ROGERS,
Appellants,

vs.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

REPLY IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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DATE: April, 1986

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REPLY TO APPELLEES' MOTION TO DISMISS

Pursuant to Rule 16.5, appellants hereby reply to appellees' motion to dismiss and request that said motion be denied.

———o———

STATUTES INVOLVED

Additional relevant statutory provisions, not previously set forth by the parties, are herein set forth.

WYO. STAT. 1-26-516 (Supp. 1985) provides as follows:

When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of land, due to activities on adjoining land without the authorization of the owner of the land or before filing an action of condemnation, the owner of the land may file an action in district court seeking damages for the taking or damage and shall be granted litigation expenses if damages are awarded to the owner. (Laws 1981, ch. 174, § 1.)

———o———

SUMMARY OF ARGUMENT

1. This case is "ripe" for review since it has been acknowledged by the parties and proven by uncontroverted evidence that it would have been *futile* for the appellants to seek a variance.

2. The application of the "multifactor standards" of *Penn Central* is inappropriate when regulation results in actual *use* of private property for a public purpose.

3. There is direct and significant conflict among the state courts concerning the constitutionality of airport height limitation ordinances.

ARGUMENT I.

THIS CASE IS "RIPE" FOR REVIEW

Appellees, apparently taking notice of the assertion of the lower court that appellants never applied for a variance, raise the issue of "ripeness" for the first time in this court. (See Appellees' Motion to Dismiss, p. 7). Even though appellees state that, " . . . further proceedings in this case will not produce a different result," (Appellees' Motion, p. 7), they cite *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. —, 105 S.Ct. 1381, 87 L.Ed.2d 126 (1985) for the proposition that there may be a "procedural" defect, (rather than a "jurisdictional" defect), upon which this court should deny jurisdiction.

If this case is not ripe for review in this court, it was not ripe in the first instance and this court should reverse on grounds that the lower court exceeded its jurisdiction in reaching the merits of the constitutionality of the ordinance under the United States Constitution.

However, "ripeness" has never been an issue in this case since seeking a variance prior to suit was considered

to be *futile* by the parties as evidenced by an informal agreement between counsel. (See Affidavit of Bernard Pitts attached to appellants' Motion to Supplemental Record, *infra*, Appendix A, p. 3a.)

The *futility* of seeking a variance was clearly demonstrated at trial by uncontroverted evidence that the Federal Aviation Administration had directed the appellees to enforce the ordinance to the letter to maintain an obstruction free noninstrument approach zone, or to face displacement of the affected runway.

Thus, by virtue of the obvious *futility* of any effort by appellants to seek a variance, the case was and remains "justiciable" and "ripe" for review. Davis, *Administrative Law Treatise*, 2nd Edition, Section 26:1, pp. 414-415. This is especially true when the sole issue before the court is the constitutionality of the ordinance. *Weinberger v. Salfi*, 422 U.S. 749, 45 L.Ed.2d 522, 95 S.Ct. 2457 (1975). The principle of "Finality" set forth in *Williamson County, supra*, has been met in this case.

The allusion by appellees to the possible remedy of "inverse condemnation" being available to appellants, as it was to the landowners in *Williamson County, supra*, is misplaced in this case since this is not an action under 42 U.S.C. 1983. *Williamson County, supra*, applied the rule set forth in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), when it held that the case was not properly brought under 42 U.S.C. 1983 until the landowner had sought compensation under the state law

of "inverse condemnation." *Williamson, supra*, p. 143. Since this is an action for declaratory and injunctive relief under state law, the *Parratt, supra*, "adequate state remedy" rule is inapplicable.

Furthermore, inverse condemnation was not available to appellants since their property rights were only threatened. There must be actual occupancy or damage (not merely threatened occupancy or damage) before inverse condemnation is available under Wyoming law. WYO. STAT. 1-26-516 (Supp. 1985).

ARGUMENT II.

A "MULTIFACTOR STANDARDS" ANALYSIS IS INAPPROPRIATE WHEN REGULATION RESULTS IN ACTUAL USE OF PROPERTY BY THE PUBLIC.

Appellees, as well as the lower court, argue that the multi-factor analysis is applicable to a case where a "zoning" regulation restricts the owner's use of his airspace, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The essential and important distinction between the *Penn Central, supra*, case and the instant case is that the Cheyenne ordinance was enacted to provide an unobstructed approach zone for the *use* of the public for air transportation; while the New York ordinance was to maintain certain historical landmarks for (presumably) aesthetic and historical purposes.

This case *is not* an excess regulation case where an ordinance "goes too far" which results in a "taking" as

in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). This case is one where the government wishes to use appellants' lawfully vested property rights for a public purpose.

Mr. Wood, the airport manager, testified as follows as to the purpose of the zoning ordinance:

> Q. (By Mr. Phelan) What is the approach zone?
>
> A. It's an area which in space, in air which the F.A.A. designates as a minimum area for aircraft approaching the runway.
>
> * * * *
>
> Q. And the purpose of the approach zone is to allow airplanes to approach the . . .
>
> A. A clear area for aircraft approach runway depending on the type of runway useage [sic], different classifications of runways require different approaches.
>
> * * * *
>
> Q. Would I be incorrect in saying, and I'm not an expert in this, that a noninstrument approach zone would be an approach zone which would be as clear as possible of obstructions?
>
> A. I suppose, yeah. I think the intent of having the approach zone is to keep it clear, period.
>
> Q. Okay. And it's for purposes of providing a means by which airplanes can safely land?
>
> A. That's correct, and take off, but primarily landing.
>
> (J. Wood Deposition, Exhibit 24, p. 9.)

It is clear from uncontroverted evidence that the ordinance was enacted to restrict appellants' use of their vested property rights *so that the public could use their property* for purposes of landing and take off of aircraft from the nearby airport.

Thus, by enforcing the ordinance the appellees demanded that appellants a) cut down a large tree located on their property without compensation; and b) keep their airspace "clear", that is, not use it for anything. Such total restriction of use and transfer of use to the public is a "taking" in the classic sense.

Whether or not the appellants had an investment backed expectation in the use of their airspace or whether the removal of the tree had a "particular" impact on the residential use of their property as a whole, are questions which are irrelevant when the public is granted *use* of appellants' rights in their vested property rights. (See WYO. STAT. 10-4-302 and 10-4-303(a) providing "vested" ownership of airspace in surface owners.)

Therefore, the "character of the government action" factor set forth in *Penn Central, supra*, is "determinative", *Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, 458 U.S. 419 (1982), since the public is granted use and access to appellants' property by virtue of the ordinance. *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979).

———o———

ARGUMENT III.

THERE IS DIRECT CONFLICT AMONG STATE COURTS CONCERNING THE CONSTITUTIONALITY OF AIRPORT HEIGHT LIMITATION ORDINANCES.

Since *United States v. Causby*, 328 U.S. 256 (1946) and, later, *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962), many state courts have dealt with the issue of "taking" of airspace both in the context of frequent overflight without "zoning" being an issue (See e.g., *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 348 P.2d 664 (1960)); and in the context of zoning ordinances restricting use of airspace. (See e.g., *Indiana Toll Road Commission v. Jankovich*, 193 N.E.2d 237 (Ind. 1963); *Roark v. City of Caldwell*, 394 P.2d 641 (Id. 1964); *Jackson Municipal Airport Authority v. Evans*, 191 S.2d 126 (Miss. 1966)).

In all of the cases dealing with zoning ordinances, the courts have held that *Causby* and *Griggs*, *supra*, require that when actual damage is shown, the ordinances be declared unconstitutional "takings." Only the Wyoming Court, in *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo. 1985), has held that, *even when actual damage is shown*, the ordinance is not a taking requiring just compensation.

The courts which have held that no taking has occurred uniformly also find that no damage has been shown, (See e.g., *Harrel's Candy Kitchen v. Sarasota-Manatee Airport Authority*, 111 S.2d 439 (Fla. 1959); *Waring v. Peterson*, 137 S.2d 268 (Fla. App. 1962); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39, 278 N.E.2d 658

(1962), *LaSalle National Bank v. County of Cook*, 34 Ill. App.3d 264, 340 N.E.2d 79 (1975)).

Despite the bald assertion of the lower court that appellants never ". . . demonstrated any evidence of substantial interference with the use and enjoyment of the surface," *Cheyenne Airport Board, supra,* at p. 729, the evidence was uncontroverted that to enforce the ordinance would cause a loss to the appellants of $2,064.00. Such a loss is substantial—but the dollar amount of the loss *should not* in any way be determinative since the "taking" is occasioned by actual *use* of the appellants' property by the public for public transportation. Such use should be *determinative. Loretto, supra.*

In the same vein, proof that the public will or has actually used or occupied the property only intermittently should not foreclose a finding that a "taking" is involved. The fact that the public is granted *access* should be determinative. *Kaiser-Aetna, supra.* A public road that is not used is nonetheless a public road.

Such great conflict between the Wyoming Supreme Court and the opinions of this court, as well as the Wyoming Court's extreme departure from well reasoned opinions of other state courts creates a conflict which, if this court affirms the lower court, will create chaos in the law of airspace "takings" as set forth in *Causby* and *Griggs, supra.*

———o———

SUMMARY

This case is ripe for review and presents a substantial federal question regarding the constitutionality under the Fifth and Fourteenth Amendments of so-called airport zoning laws since the lower court has significantly departed from established precedent of this court and is in conflict with numerous other state court decisions.

———o———

CONCLUSION

Appellees' Motion to Dismiss should be denied and probable jurisdiction should be noted. In the alternative, the lower court should be summarily reversed.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF WYOMING

No. 84-301

CHEYENNE AIRPORT BOARD and
CITY OF CHEYENNE,

Appellants
(Defendants),

v.

TERRY ROGERS and BRENDA ROGERS,

Appellees
(Plaintiffs).

MOTION TO SUPPLEMENT
THE RECORD REGARDING
"RIPENESS" ISSUE

(Filed Oct. 23, 1985)

COMES NOW the appellees, above named, and move the court for an order granting leave to supplement the record. The grounds for this motion are as follows:

1. Attached hereto is the affidavit of Bernard Pitts wherein he relates his recollection of a conversation between appellees' counsel and himself, prior to commencement of suit regarding appellees' counsel's inquiry regarding exhaustion of remedies.

2. That based upon said conversation, the issue of "variance" or "ripeness" was not raised by pleading, evidence or argument by the City or its co-defendant.

3. That this court has, in its opinion deciding this matter, found that no variance was sought and that, by

implication, the case was not ripe for review; although it purported to review the zoning ordinance on constitutional grounds.

4. That given the silent record concerning the failure to seek a variance, and given a statement by a former City Attorney explaining such silence, the record should be made complete and the appellant-city should be bound by informal good-faith representations by its agents which were, in fact, carried out.

BRENDA ROGERS and
TERRY ROGERS
Appellees - Petitioners

/s/ BY: Bernard Q. Phelan
Attorney for Appellees - Plaintiffs
P. O. Box 1841
Cheyenne, Wyoming 82003-1841

CERTIFICATE OF SERVICE

I, Bernard Q. Phelan, hereby certify that on the 23rd day of October, 1985, I served a true and accurate copy of the foregoing Motion to Supplement the Record Regarding "Ripeness" Issue by depositing same in the United States mail, postage prepaid, addressed to:

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Mr. John C. Patton
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/s/ Bernard Q. Phelan

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October 18, 1985

To Whom It May Concern:

In the early part of 1984, Mr. Bernard Q. Phelan, Attorney-At-Law, phoned me at the City Attorney's office. He was preparing further legal action in the Rogers case and asked me if the City intended to raise the issue of exhaustion of administrative remedies. I informed Mr. Phelan that I was not the attorney handling the case for our office; that Mr. R. Walter Connel, Jr. was doing that. I also informed Mr. Phelan that the City, to the best of my knowledge, was not going to raise the issue he mentioned. I later remember confirming this belief with Mr. Connell. I understand that the City did not raise this issue in brief or in argument before the Wyoming Supreme Court. This conversation with Mr. Phelan took place, to the best of my recollection, after the City Council had failed to override the Mayor's veto of the relief voted to Mr. Rogers, but before Mr. Phelan filed his Complaint with the District Court.

/s/ Bernard R. Pitts

STATE OF WYOMING)
) ss
COUNTY OF LARAMIE)

The foregoing instrument was acknowledged before me as to BERNARD R. PITTS this 10th day of October, 1985.

Witness my hand and official seal.

/s/ Jo-Ann Palluck
Notary Public